Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978.

No. 78-1813

SAMUEL H. SLOAN,

Petitioner,

-against-

FRANK G. RAICHLE, CHEMICAL BANK, CHASE MANHATTAN BANK, FIRST NATIONAL BANK OF CHICAGO, MARINE MIDLAND BANK, LINCOLN FIRST BANK OF ROCHESTER, THE TRAVELER'S INDEMNITY CO., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN
Petitioner pro se
243 West 99th Street
New York, N.Y. 10025
(212) 864-5770

DICK BAILEY PRINTERS, 290 RICHMOND AVENUE, S.I., N.Y. 10302
TEL.: (212) 447-5358

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions Involved 4

Statutes Involved 4

Statement of the Case 5

Reasons for Granting the Writ 12

Conclusion 18

Appendix A 1a

Appendix B 2a

Appendix C 3a

Appendix D 4a

Appendix E 5a

Appendix F 8a

Appendix G 9a

Appendix H 14a

Appendix I 17a

Appendix J 19a

Appendix K 23a

Appendix L 24a

CASES CITED

Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 525-527 (1941) 15

In the Matter of Muskegon Motor Specialities, 366 F. 2d 522 (6th Cir. 1966) 15

In the Matter of Stirling Homex Corporation, 579 F.2d 206 (2d Cir. 1978), cert. denied sub. nom. *Jezarian v. Raichle* __ U.S. __ (1978) No. 78-869, __ U.S. __ (1979) 17

In the Matter of Stirling Homex Corp., __F.2d__(2d Cir. November 22, 1978) 17

S.E.C. v. Sloan, 538 F.2d 313 (2d Cir. 1976) cert. denied 429 U.S. 1023 (1976) 14

Stockholder Protective Committee of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 442 (1968) 15

United States v. Stirling, 571 F.2d 708 (2d Cir. 1978), cert. denied No. 77-1612, __U.S.__(1978) 6

OTHER AUTHORITIES

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

Section 167(5) and (6) of the Bankruptcy Act, 11 U.S.C. 567(5) and (6) 4

Section 169 of the Bankruptcy Act, 11 U.S.C. 569 5

Section 216(8) of the Bankruptcy Act, 11 U.S.C. Section 616(8) 5

Collier on Bankruptcy, Volume 6, par. 1013 at 6268 and par. 11.05 at 184-195 (14th ed. 1978) 15

Collier on Bankruptcy, Volume 6, part 2, par. 9.02 at 1517 (14th ed. 1978) 16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978.

No._____

SAMUEL H. SLOAN,

Petitioner,

-against-

FRANK G. RAICHLE, CHEMICAL BANK, CHASE MANHATTAN BANK, FIRST NATIONAL BANK OF CHICAGO, MARINE MIDLAND BANK, LINCOLN FIRST BANK OF ROCHESTER, THE TRAVELER'S INDEMNITY CO., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated December 12, 1978, which dismissed "on the merits" an appeal from an order of the United States District Court for the Western District of New York which denied a motion to vacate an order of that court which declared Stirling Homex Corporation to be insolvent and which further

declared that the stockholders have no right to vote on or participate in any plan of reorganization and to review the decision of the United States Court of Appeals for the Second Circuit dated March 6, 1979, in which a petition for a rehearing and suggestion that the rehearing be en banc was denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit which dismissed the appeal was issued orally from the bench and has not been officially reported. The tape recording which the United States Court of Appeals for the Second Circuit normally makes of such oral decisions is, in this instance, inaudible and, therefore, a transcript cannot be provided. A copy of a letter from the Deputy Clerk of the Court of Appeals explaining this circumstance is annexed hereto as Appendix A. Subsequent to the oral decision of the Court of Appeals dismissing this appeal, the Court entered a written order which specified that the appeal was dismissed "on the merits." A copy of this written order is included as Appendix B to this petition. An order of the United States Court of Appeals for the Seconod Circuit dated March 6, 1979, which denied a petition for a rehearing is included as Appendix C to this petition. An order of that Court on the same date denying a suggestion that the rehearing be en banc is included as Appendix D to this petition. The decision and order of the District Court, Burke, J. from which the appeal was taken is included as Appendix E to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit which dismissed the appeal was entered on December 12, 1978. A petition for rehearing and suggestion that the rehearing be en banc was denied on March 6, 1979. Jurisdiction of this Court is involved under 28 U.S.C. §1254(1). The

time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from March 6, 1979 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit lack the authority to dismiss an appeal "on the merits" upon a determination that the appeal was frivolous?

2. In proceedings under Chapter X of the Bankruptcy Act, did the United States District Court for the Western District of New York err in finding Stirling Homex Corporation to be insolvent solely upon a proffered showing by the Trustee in Reorganization that the total liabilities exceeded the total assets, where no attempt was made to determine the earnings capacity or the "net present value" of the debtor corporation?

3. Was the Trustee in Reorganization required to provide petitioner, a major preferred stockholder in Stirling Homex Corporation, with notice of insolvency hearing at the address petitioner provided to the Trustee when he sent in his securities for transfer?

4. Was the Trustee in Reorganization in proceedings under Chapter X of the Bankruptcy Act required to maintain a stock transfer agent for the debtor corporation so as to insure that a current list of names and addresses of all stockholders be maintained so that those stockholders would receive the notices required to be sent to them by the Bankruptcy Act and the Bankruptcy Rules thereunder?

5. Did comments made by Judge Timbers, the presiding judge of the panel of the Court of Appeals, during the course of the oral argument on the Trustee's motion to dismiss the appeal of

petitioner, regarding the fact that Judge Timbers was currently taking care of the Trustee's dog, create such an appearance of bias and impropriety on the part of the judge as to require this Court to vacate the order dismissing the appeal?

6. Does the fact that the tape recording of the oral argument before the Court of Appeals and the oral decision dismissing the appeal which followed is inaudible for reasons unexplained or unknown require this Court to vacate the decision of the Court of Appeals?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, states:

"No person shall . . . be deprived of . . . liberty or property without due process of law . . ."

STATUTES INVOLVED

Section 167(5) and (6) of the Bankruptcy Act, 11 U.S.C. 567(5) and (6), provide:

"The trustee upon his appointment and qualification—

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named."

Section 169 of the Bankruptcy Act, 11 U.S.C. 569, provides:

"Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

Section 216(8) of the Bankruptcy Act, 11 U.S.C. §616(8) provides:

"Sec. 216. A plan of reorganization under this chapter—

(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of stock required under this chapter . . . *Provided, however,* that such protection shall not be required if the judge shall determine that the debtor is insolvent."

STATEMENT OF THE CASE

Stirling Homex Corporation was a major high flyer in the bull stock market of the early 1970's. There were two public offerings of securities in this corporation. The first was an offering of 1,175,000 common shares at $16-1/2 per share through the brokerage firm of R.W. Pressprich & Co., Inc. in February, 1970. The second was the sale of 500,000 preferred shares at $20 per share through the brokerage firm of Merrill Lynch Pierce Fenner & Smith Inc. in late July, 1971. After many ups and downs, the market for these securities collapsed on July 12, 1972, when the corporation filed a petition for reorganization under Chapter X of the Bankruptcy Act. The result was losses to tens of thousands of public investors estimated to have been as high as $100,000,000. Thereafter, the principal officers of the

Corporation were sentenced to various prison terms. See *United States v. Stirling*, 571 F.2d 708 (2d Cir. 1978), *cert. denied* No. 77-1612, _____U.S._____ (1978).

Subsequent to the filing of the bankruptcy petition, Samuel H. Sloan, the petitioner here, purchased in the open market 50,400 preferred shares and 4,850 common shares of the Corporation. Considering that, after conversion of preferred shares into common, there were 384,547 preferred shares then outstanding, this meant that petitioner owned more than 13.1% of the total outstanding preferred shares. Petitioner was able to have a small portion of these shares transferred into his name in 1972. However, in early 1973, the Trustee in Reorganization, Frank G. Raichle, directed the transfer agent, Chemical Bank, which also claims to be the largest creditor of the debtor, to stop transferring the stock and accordingly Chemical Bank closed its transfer records on April 30, 1973. Thereafter, when petitioner attempted to tender his shares to Chemical Bank for transfer, he was directed to forward them to Jaeckle, Fleischmann & Mugel, a law firm which was then acting as counsel for the Trustee. Accordingly, petitioner mailed that law firm 1,250 common shares as well as 46,300 preferred shares of Stirling Homex Corporation along with a request that these securities be transferred into his name. In response, petitioner received a letter, a copy of which is included as Appendix F to this petition, which stated:

"Mr. Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Virginia 24503

Re: *Stirling Homex Corporation*

Dear Sir:

We are in receipt of several stock certificates you forwarded to our Mr. Schapiro.

We wish to advise you that Stirling is presently experiencing some difficulties with its transfer agent. As soon as matters there are ironed out, we will forward the securities to it for transfer.

Very truly yours,

JAECKLE, FLEISCHMAN & MUGEL

By:
Eugene J. Smolka"

Following receipt of this letter, petitioner naturally assumed that although the shares he had sent to counsel for the Trustee for transfer into his name were not being readily transferred, the Trustee would nevertheless send to petitioner at the address set forth in the letter a copy of all notices required to be sent to stockholders pursuant to the various provisions of the Bankruptcy Act. However, this assumption proved to be misplaced because in late August, 1977 petitioner made a telephone call to the Trustee and learned that on June 13, 1977, the United States District Court for the Western District of New York had entered an order which stated that "no objection having been urged by any part in interest . . . it is determined . . . that . . . Stirling Homex Corproation, the consolidated debtor, is insolvent and the stockholders have no equity in said consolidated debtor and are not entitled to vote on a plan or share in the distribution of the proceeds of the liquidation of the assets." A copy of this order is included as Appendix G to this petition.

After learning of this order which in effect declared the 50,400 shares of Stirling Homex preferred stock owned by petitioner to be worthless, petitioner wrote to the Trustee and asked that these proceedings be reopened. A copy of petitioner's letter is included as Appendix H to this petition. Thereafter, petitioner received a reply from counsel for the Trustee, a copy of

which is included as Appendix I to this petition. After obtaining copies of the pertinent court documents, petitioner then moved to reopen this proceeding and also moved the district court to order the Trustee to retain the services of a stock transfer agent. in particular, petitioner contended that the order of the district court providing for service of the notice of the insolvency hearing was fatally defective in that it required that the notice be served:

> "2. Upon the shareholders of Stirling Homex Corporation, consolidated debtor, at the addresses listed for said shareholders upon the records of the debtor,as of December 31, 1973."

Petitioner pointed out that the Trustee could not possibly have complied with this order because, as noted previously, the transfer records of Stirling Homex Corporation were closed on April 30, 1973, i.e. eight months before the December 31, 1973 date. Petitioner further pointed out that this discrepancy was particularly significant because petitioner had moved and changed his address between the date of April 30, 1973, when the transfer records were closed, and the date of December 31, 1973, the date referred to in the district court's order. Had the trustee in fact complied with the order of the district court by mailing a copy of the notice to the address of petitioner on December 31, 1973, he would have mailed it to 917 Old Trents Ferry Road, Lynchburg, Virginia 24503, the address given on the letter from the Trustee's counsel bearing the date October 8, 1973. However, the Trustee had sent no mail to that address, as he later admitted. Instead, he had sent the notice to 120 Liberty Street, New York, N.Y. 10006, the address provided by petitioner when he transferred a small number of shares into his name in 1972. The building at 120 Liberty Street, New York, New York was closed in 1974 and was subsequently demolished as part of the expansion of the World Trade Center complex and petitioner clearly could not have received mail there. Nevertheless, although the Trustee never denied that the mail sent to

120 Liberty Street, New York, New York was returned to him by the post office, he still contended that he had "strictly complied" with the order of the district court. The brief submitted by counsel for the Trustee to the district court stated:

> "The fact that Sloan may or may not have received his mail is beside the point. Notice was served on him at the address which appeared on records of the transfer agent of Stirling Homex Corporation. Nowhere does it appear that Sloan denies that this was his proper address during the time when the stockholder list was compiled."

Similarly, an affidavit of Byron Johnson submitted in support of the Trustee's position stated that, "At no time has Sloan disputed that he did not use this address during the period 1972-73."

Petitioner's motion to vacate was argued orally before Judge Burke on November 14, 1977 and was denied on February 16, 1978. Petitioner thereafter appealed. In response, counsel for the Trustee filed a motion in the Court of Appeals for an order dismissing the appeal "as being frivolous and without merit." The motion in its entirety consisted of a notice of motion on a form provided by the court, a two page affidavit by counsel for the Trustee, and a single exhibit, that being Judge Burke's decision of February 16, 1978 denying petitioner's motion. No memorandum of law was filed in support of this motion and no cases were ever cited by the Trustee or his counsel in support of the proposition that an appeal can be dismissed under these circumstances. A copy of the Trustee's motion and affidavit and exhibit in support is included as Appendix J to this petition. In spite of the unusual character of this motion, oral argument was scheduled on it for December 12, 1978. Because during the intervening period, petitioner was also required to file his brief and appendix, petitioner was unable to devote his full attention to this motion but did file an affidavit in opposition. Chemical Bank, as the principal creditor, filed papers in support of the

Trustee's position but did so just three days prior to the scheduled oral argument, thereby precluding a response by petitioner.

At the oral argument, when this case was called and the Trustee stood up to address the court, pro se, he was almost immediately interrupted by Judge Timbers, the presiding judge, who notified him that his dog was in good health. After this followed several minutes of colloquy in which the Trustee and the judge discussed purely personal matters. Although it was difficult to determine from this colloquy what the relationship between the Trustee and the judge was, it was clear that they knew each other personally and the judge had been taking care of the Trustee's dog. Petitioner understands that Judge Timbers is known to be a great lover of dogs. After this colloquy, the Trustee presented his oral argument which consisted primarily of ad honimum attacks against petitioner personally.[1] Thereafter, petitioner was allowed to respond and then the court announced from the bench that the appeal was dismissed. In dismissing the appeal, Judge Timbers made a brief statement and emphasized that the dismissal was "on the merits."

On December 15, 1978, Judge Meskill, one of the judges of the panel, entered an order which in effect directed the clerk's office to return to petitioner the briefs and appendices which he had submitted to the court of appeals. Although petitioner had completed the preparation of a 69 page brief and a 232 page appendix and had submitted to the court of appeals the requisite

1. During the time that this appeal had been pending, petitioner had been imprisoned in Afghanistan, had escaped from custody, had been rearrested while attempting to leave that country, and, after the passage of a total of three months, had been released substantially through the efforts of the United States Embassy. During his oral argument in the Court of Appeals, the Trustee dwelt at length on this circumstance. However, the fact is that petitioner was a political prisoner in Afghanistan, arrested for being a suspected CIA agent following the Communist takeover in that country, and suffered a better fate than the United States Ambassador, who was subsequently murdered by the Afghan police.

number of copies of these documents along with proof of service on all opposing parties during the week preceeding the oral argument, the clerk's office had never filed them and had held them in abeyance pending determination of the Trustee's motion to dismiss. These documents were then returned by mail to petitioner following Judge Meskill's order of December 15, 1978. A copy of this order is included as Appendix K to this petition.

Following this and the subsequent denial of a petition for a rehearing, petitioner requested a transcript of the oral decision and also filed a motion for a transcript of the oral argument so as to be able to include these transcripts as appendices to this petition for a writ of certiorari. Thereafter, he spoke to the Deputy Clerk of the Court of Appeals by telephone and was informed that the tape recording which is routinely made of oral arguments and decisions in the court of appeals was, in this case, "completely blank." Thereafter, with regard to petitioner's motion for a transcript of the oral argument, Judge Timbers issued a decision, a copy of which is included as Appendix L to this petition, which stated:

> "It is hereby ordered that the motion made herein by the appellant by notice of motion dated May 1, 1979 for leave to file a motion for a transcript of oral argument be and it hereby is *GRANTED* to the extent that, for whatever it may be worth, the transcript shall be furnished to appellant pursuant to the usual-practice of this Court, *provided* that appellant understands that, due to technical difficulties, the tape is inaudible."

Petitioner now petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

There are two almost completely unrelated sets of issues involved in this case. The first concerns the question of whether the district court was correct in refusing to vacate the order finding Stirling Homex Corporation to be insolvent. The second concerns the propriety of the actions of the court of appeals in dismissing the appeal "on the merits." It is submitted that petitioner had a good and meritorious appeal and was entitled to prevail on the merits. However, it is also submitted that even were this not true and even were the appeal of petitioner entirely frivolous, the court of appeals still would lack the authority to dismiss an appeal on the merits. It should be pointed out that there is an important distinction to be made between the dismissal of an appeal and other action by an appellate court such as the summary affirmance of the court below. A court of appeals will entertain and, in appropriate cases, grant a motion to dismiss an appeal on jurisdictional grounds such as the failure to file a notice of appeal on time or the fact that the appeal is being taken from a non-appealable order. There can be other reasons for the dismissal of an appeal such as the failure of the appellant to abide by court rules by not timely transmitting the record, for example. However, it can fairly be stated that in all cases where an appellate court properly dismisses an appeal, it is for technical or jurisdictional reasons rather than reasons pertaining to the merits. Stated differently, an appeal can never be dismissed "on the merits." If an appeal is truly lacking in merit, an appropriate course might be for a court to entertain a motion for a summary affirmance. Normally, however, the practice in the Second Circuit is not to entertain such motions until at least the appellant has filed his brief and dappendix. In the case presented here, a motion for a summary affirmance was never filed and had such a motion been filed, the court would not have refused to receive appellant's brief and appendix, as it did here, but instead would have received and considered them in connection with the motion, assuming it decided to entertain such a motion at all.

In the case presented here it was apparent from remarks made during the oral argument that the judges of the panel had never read or even examined the brief and appendix submitted by petitioner. It was equally obvious that they had not read the record either, since the full record had not yet arrived in the clerk's office because certain parts of the record were still in the process of being transmitted from the district court. It was also obvious that when the full court of appeals denied petitioner's suggestion that the rehearing be en banc, as it did on March 6, 1979, it had not become familiar with the facts of this case for the simple reason that within a few days of the court's decision of December 12, 1978, the record of the appeal was returned to the district court and the briefs and appendices were returned to petitioner. Furthermore, it is now apparent that the tape recording which was routinely made by the court of appeals of the oral argument and oral decision is "completely blank" although when and how this circumstance arose has never been made clear. In short, there is no way that anyone viewing the record of this case as it now stands in the court of appeals can determine the reasons for which the court of appeals dismissed this appeal, or even what the appeal was all about. Therefore, in this case the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision" and therefore this petition for a writ of certiorari should be granted because of considerations set forth in Rule 19(1)(b) of the Rules of this Court.

It is also submitted that the singular inappropriateness with which the presiding judge conducted a personal conversation regarding the health of the Trustee's dog during the course of the oral argument requires the granting of the writ. Of course, the exact words of the presiding judge cannot now be determined due to the fact that the tape recording is inaudible and this circumstance, among other things, leads petitioner to believe that Judge Timbers may have personally erased the tape, par-

ticularly since petitioner made remarks critical of Judge Timbers in this regard in his petition for a rehearing. It is also appropriate to point out that there has been a running feud between Judge Timbers and petitioner going back to at least January, 1976, when a panel consisting of Judges Timbers, Meskill and Van Graafeiland, virtually the same panel as the one that acted in the instant case, summarily and *sua sponte* dismissed three appeals filed by petitioner. See *S.E.E. v. Sloan,* 538 F. 2d 313 (2d Cir. 1976), *cert. denied* 429 U.S. 1023 (1976). Subsequently, petitioner wrote to Judge Timbers, referred among other things to his position as former general counsel for the Securities and Exchange Commission and asked him to recuse himself from hearing any further cases involving petitioner, something which Judge Timbers has evidently decided not to do. It seems quite likely that a degree of personal animosity which Judge Timbers feels towards petitioner explains the otherwise inexplicable actions of the court of appeals in this case, and since the Supreme Court is the only court capable of exercising supervisory control over the court of appeals it follows that this petition for a writ of certiorari should be granted.

However, on another level this case is important because of the impact it has on the rights of the thousands of stockholders of Stirling Homex Corporation. During the week prior to the filing of the instant petition there has been widespread newspaper publicity concerning a settlement of $10,535,000 which has been negotiated with some of the defendants in a class action brought on behalf of purchasers of stock in Stirling Homex Corporation.[2] The remaining principal non-settling defendant in that suit is Chemical Bank, which is alleged in the

2. Petitioner is not a member of that class, having purchased his stock after the cut-off date fixed by the court, and therefore will not be permitted to participate in that settlement.

complaint to have dominated and controlled Stirling Homex Corporation and to have defrauded the preferred stock purchasers. If the order of Judge Burke involved in the instant appeal is allowed to stand, the result will be that almost all of the assets of the estate, which have been adjudged to be $16,986,376, will be paid to a consortium of banks headed by Chemical Bank without any hearing on the question of whether the banks committed the fraud which brought about the bankruptcy.[3] It is submitted that this case is on all fours with *Stockholder Protective Committee of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 442 (1968), and accordingly, the decision of the district court must be reversed. See also *In the Matter of Muskegon Motor Specialties,* 366 F.2d 522 (6th Cir. 1966).

In addition, there is a long line of cases beginning with *Consolidated Rock Products Co. v. Du Bois,* 312 U.S. 510, 525-527 (1941) which establish that a determination of whether a debtor is "insolvent" must be based upon the determination of the earning power of the corporation as a going concern. See *Collier on Bankruptcy,* Vol. 6, ¶10.13 at 62-68 and ¶11.05 at 184-194 (14th ed. 1978). However, the Trustee's accountant stated in a letter dated November 28, 1977 that no such determination has yet been made. Similarly, one would suppose that an application for an order declaring a corporation to be insolvent would include a current balance sheet of that corporation. However, the most recent balance sheet to be found in the Trustee's application, which was filed on April 18, 1977, was a balance sheet "as at July 11, 1972," the date before the petition in bankrupt-

3. At an early stage of this Chapter X Bankruptcy proceeding, the Trustee filed objections to the creditor claims of the banks on the grounds that the banks defrauded the stockholders and dominated and controlled the corporation. Now, however, the Trustee says that he has "settled" his dispute with the banks, even though the stockholders and other interested parties have never been notified of any proposed settlement of objections grounded upon fraud or even that such objections were ever filed.

cy was filed. This balance sheet was accompanied by an accountant's letter dated July 24, 1973. In fact, the balance sheet dated July 11, 1972 is the most recent balance sheet of any kind available for Stirling Homex Corporation.[4] The Trustee has never filed a 10-K or a 10-Q report, although required to do so by S.E.C. rules. Moreover, although the Trustee's counsel has asserted that the Trustee testified at the hearing before Judge Burke as to the insolvency of the debtor, an examination of the transcript shows that the Trustee devoted a total of one sentence to the insolvency question and in that sentence he said simply that, "It is obvious, if I might comment, that Stirling Homex Corporation . . . is hopelessly insolvent and that there remains nothing for the stockholders."

Since there was no opposition to the insolvency determination, there was no cross examination on this matter. Thus it is apparent that the only reason that the district court was able to determine that the corporation was insolvent was that there was no opposition to the Trustee's application and the reason that there was no opposition was that so many stockholders had moved and changed their address since the date that the Trustee terminated the services of the transfer agent that few received the notice. It is submitted that the Trustee should have been required to retain a stock transfer agent or to transfer the securities himself consistent with the principle expressed in *Collier on Bankruptcy,* Vol. 6, part 2, ¶9.02 at 1517 (14th ed. 1978) that, "Provision should be made to enable legitimate trading in

4. Since the decision of December 12, 1978, the Trustee has filed a Notice Pursuant to Section 171 of the Bankruptcy Act. The only financial information contained in this notice is a "Statement of Cash Receipts and Disbursements" which is accompanied by a cover letter from Ernst & Ernst, the successor accountant for the consolidated debtor, which forthrightly states that the financial statement has been prepared "not in conformity with generally accepted accounting principles."

securities to continue and to care for the sale, assignment or transfer of the same."[5]

Moreover, because of the fact that the Trustee has never called a meeting of stockholders and creditors, although required to do so by Rule 10-212 of the Bankruptcy Rules, a stockholders protective committee has never been formed in this case and it is such a committee that usually protects the rights of stockholders in cases such as this. In addition, although the Trustee has contended that shareholders other than petitioner were represented at the hearing which resulted in the determination that the debtor was insolvent, the fact is that the shareholder representatives in question were attorneys appearing for an entirely different purpose, namely to assert the rights of an allegedly defrauded class of common and preferred stock purchasers of which petitioner is not a member. In fact, those stockholder representatives subsequently appealed from a different order of Judge Burke entered after the hearing on that date and that appeal is reported as *In the Matter of Stirling Homex Corporation,* 579 F.2d 206 (2d Cir. 1978), cert. denied *sub. nom. Jezarian v. Raichle* __ U.S. ___ (1978), No. 78-869, ___ U.S. ___ (1979).

What this all demonstrates is that petitioner did have a meritorious appeal and his appeal should not have been dismissed by the court of appeals without the judges of that court even having read his brief and appendix or the record of this appeal. Indeed, another appeal from an order denying a motion to vacate the same order of Judge Burke was entertained by the court of appeals and a lengthy opinion was written which, although affirming the denial of the motion to vacate, essentially gave the appealing party all of the relief it was requesting. See *In the Matter of Stirling Homex Corporation,* __ F. 2d __ (2d Cir. November 22, 1978).

5. In contrast, shortly after his appointment, the Trustee requested the Securities and Exchange Commission to suspend trading in Stirling Homex Corporation. See Securities Exchange Act Release No. 9873 (November 21, 1972). The S.E.C. complied with this request.

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL H. SLOAN
243 West 99th Street
New York N.Y. 10025
(212) 864-5770

Dated: New York, New York
June 4, 1979

APPENDIX A
LETTER DATED MAY 10, 1979

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
Clerk

May 10, 1979

Samuel H. Sloan
243 West 99th Street
Apt. 7B
New York, New York 10025

Re: In the Matter of Stirling Homex Corp.
Docket No. 78-5016

Dear Mr. Sloan,

This is to advise that we are unable to comply with your request for a transcript of the court's oral decision of December 12, 1979 on the above matter since the tapes are inaudible.

Yours truly,

A. DANIEL FUSARO,
Clerk
BY: s/ Arthur Heller
Arthur Heller, Deputy Clerk

AH/mz

APPENDIX B
ORDER DATED DECEMBER 12, 1978

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of December, one thousand nine hudnred and seventy-eight

---

In the Matter of:
STIRLING HOMES CORPORATION,

Debtor

(Matter of Samuel H. Sloan)

Appellant

v.

CHEMICAL BANK,

Appellee

It is hereby ordered that the motion made herein by counsel for the appellee Trustee by notice of motion dated October 23, 1978 to dismiss the appeal from the United States District Court for the Western District of New York be and it hereby is granted on the merits.

A. DANIEL FUSARO,
Clerk
BY: s/ Arthur Heller
ARTHUR HELLER,
Deputy Clerk

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges
HON. JOHN F. DOOLING
District Judge

APPENDIX C
ORDER DATED MARCH 6, 1979

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of March, one thousand nine hundred and seventy-nine

Present: HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges
HON. JOHN F. DOOLING
District Judge

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor

(Matter of Samuel H. sloan)

Appellant

v.

CHEMICAL BANK,

Appellee

A petition for a rehearing having been filed herein by counsel for the appellant pro se

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro
A. Daniel Fusaro, Clerk

APPENDIX D
ORDER DATED MARCH 6, 1979
DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of March, one thousand nine hundred and seventy-nine.

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor

(Matter of Samuel H. Sloan)

Appellant

v.

CHEMICAL BANK

Appellee

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by the appellant pro se, and no active juge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

APPENDIX E
ORDER DATED FEBRUARY 16, 1978

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter
of
STIRLING HOMEX CORPORATION,

Debtor

(Matter of Samuel H. Sloan)

BK-72-1399

Johnson, Reif & Mullan
47 South Fitzhugh Street
Rochester, N.Y. 14614
Attorneys for Trustee

Leibowitz, Platzer & Fineberg
299 Broadway
New York, N.Y. 10007
Attorneys for Samuel H. Sloan

Brown, Kelly, Turner, Hassett & Leach
290 Main Street
Buffalo, N.Y. 14202
Attorneys for Traveler's Indemnity

Pomerantz, Levy, Haudek & Block
295 Madison Avenue
New York, N.Y. 10017
Attorneys for Gregory Jezarian, et al.

Milberg, Weiss, Bershad & Specthrie
One Pennsylvania Plaza
New York, N.Y. 10001
Attorneys for Harry E. Jones, et ano.

Bader & Bader
270 Madison Avenue
New York, N.Y. 10016
Attorneys for Mrs. D. Windsor Dixon

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, N.Y. 14603
Attorneys for Lincoln First Bank of Rochester

Balkin, Rodin & Goodman
750 Third Avenue
New York, N.Y. 10017
Attorneys for Chemical Bank, The Chase Manhattan Bank, N.W. and the First National Bank of Chicago

Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, N.Y. 14203
Attorneys for Marine Midland Bank

Securities and Exchange Commission
26 Federal Plaza
New York, N.Y. 10007

Brown, Wood, Ivey, Mitchell & Petty
One Liberty Plaza
New York, N.Y. 10006
Attorneys for Merrill, Lynch, Pierce, Fenner & Smith, Inc.

By notice of motion with supporting papers filed September 29, 1977 Samuel H. Sloan moves for an order granting intervention as a matter of right or by permission, vacating the order of this court which adjudicated the debtor to be insolvent and declared that the stockholders may not vote on any proposed plan of reorganization, disqualifying Frank G. Raichle from acting as Trustee in Reorganization and appointing a new trustee, and directing that the transfer books of Stirling Homex Corporation be reopened and all transfers made as are proper. The motion came on for a hearing before this court on November 14, 1977. At that time the petitioner withdrew the motion to intervene and withdrew the motion to disqualify the trustee. On due consideration it is hereby

ORDERED that the motion is in all respects denied. Due notice was given to all stockholders pursuant to the order of this court. There is no showing that a different result would be had if the matter were reopened.

s/ Harold P. Burke
HAROLD P. BURKE
United States District Judge

February 16, 1978.

EXHIBIT F

"Mr. Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Virginia 24503

Re: *Stirling Homex Corporation*

Dear Sir:

We are in receipt of several stock certificates you forwarded to our Mr. Schapiro.

We wish to advise you that Stirling is presently experiencing some difficulties with its transfer agent. As soon as matters there are ironed out, we will forward the securities to it for transfer.

Very truly yours,

JAECKLE, FLEISCHMAN & MUGEL

By:
Eugene J. Smolka"

APPENDIX G — Letter from Sloan to Raichle dated September 2, 1977

Samuel H. Sloan
1761 Eastburn Ave.
Bronx, New York 10457
(212) 864-5770 or 299-2095

September 1, 1977

Frank G. Raichle
Trustee in the Reorganization of
Stirling Homex Corporation
10 Lafayette Square
Buffalo, New York

Dear Mr. Raichle:

This is with regard to a telephone conversation I had with you last week in which you requested that I set forth in a letter certain objections I have related to your refusal to transfer shares of Stirling Homex Corporation tendered by me.

In September, 1973 I mailed Jaeckle, Fleischmann & Mugel, who was then your attorney, roughly 47,000 shares of preferred stock in Stirling Homex Corporation. I mailed these shares after I had had a telephone conversation with Mr. Shapiro of that firm in which Mr. Shapiro represented that although the services of the transfer agent of Stirling Homex Corporation, namely the Chemical Bank, had been terminated, he would transfer the shares into my name, if possible. After receiving a letter from Mr. Shapiro acknowledging receipt of the above stock certificates, I heard nothing more on the matter beyond what was said in a few telephone conversations I had as a result of calling Jaeckle, Fleischmann & Mugel from time to time. In

addition, although by tendering my shares for transfer I demonstrated that I was a stockholder in Stirling Homex Corp. I never received notices of any kind concerning the bankruptcy reorganization.

In my conversation with you last week, you informed me that United States District Judge Harold Burke had issued an order declaring both the common and preferred shares of Stirling Homex Corporation to be worthless and that, accordingly, you would continue to refuse to transfer my shares. As a result of this telephone conversation, I have conducted an inquiry into this matter because, as noted previously, I have seen or heard nothing with regard to the status of Stirling Homex Corp. and my position as a stockholder since the time of my September, 1973 communications with the law firm of Jaeckle, Fleischmann & Mugel. In the course of this inquiry I obtained from Mr. Horowitz of the New York Regional Office of the Securities & Exchange Commission a copy of two recent orders of Judge Burke as well as a document entitled "Notice Pursuant to Section 167(5), (6) and Section 169 of thre Bankruptcy Act." After examining these documents I must express disagreement with your representation of the significance of Judge Burke's decisions and orders and I must express dissatisfaction with the fact that not only have you refused to transfer my shares as required as a matter of corporation law, but you failed to serve me with a copy of the above captioned notice as required by the order of Judge Burke. I believe it is clear from Judge Burke's June 13, 1977 decision that he did not declare Stirling Homex common and preferred shares to be worthless nor did he provide any judicial authorization for your refusal to transfer my or anyone's else's shares into the name of their rightful owner.

Under Chapter 10 of the Bankruptcy Act stockholders have significant rights which have been denied me by your refusal to transfer the shares into my name and by your failure to serve me with any papers describing the progress of the bankruptcy pro-

ceedings. Section 137 of the Bankruptcy Act, 11 U.S.C. 537, provides that an answer to the Chapter 10 petition may be filed by any stockholder of the debtor. Section 171 of the Bankruptcy Act, 11 U.S.C. 571, provides that notice of the hearing on any plan of arrangement shall be given to all stockholders. Section 190 of the Bankruptcy Act, 11 U.S.C. 590, provides that copies or summaries of annual reports for the debtor must be mailed to all stockholders. In addition, numerous other provisions of the Bankruptcy Act set forth various other rights and remedies available to stockholders.

In view of your statement to me that you have not effectuated the transfer of any shares of Stirling Homex Corporation and that you do not intend to do so in the future, it appears that you are under the impression that stockholders have no rights whatever. I disagree. For this reason, I request that you reconsider your refusal to transfer my Stirling Homex shares into my name. I also request that from now on you serve me with all notices, plans, reports, and other papers filed in this case. In addition, I request that you consent to a vacatur of Judge Burke's June 13, 1977 decision and that you serve me with a copy of all briefs and other papers filed on your behalf in your application to Judge Burke so that I will be informed of the legal basis for your application in order that I may have a meaningful opportunity to oppose your application and file a brief or other appropriate papers in opposition.

I think it would [be] appropriate for you to consent to the above request not only because of your failure to serve me with a notice as required by the order of Judge Burke but because Judge Burke states in his June 13, 1977 decision that your application was granted with "no answers having been filed and no objection having been urged by any party in interest". The stock I own in Stirling Homex Corporation amounts to over 12' of the outstanding preferred shares. Quite obviously, I would have opposed your application had I received timely notice. In

addition, it is reasonable to assume that many other present stockholders of Stirling Homex Corporation did not receive your notice in view of your failure to authorize the transfer of shares of the debtor since at least September, 1973. No doubt, many persons who owned stock in Stirling Homex Corporation prior to September, 1973 subsequently sold their shares in order to take a tax loss. In addition, there can be no doubt that many persons who had their stock in the debtor maintained by a brokerage firm prior to September, 1973, subsequently received their shares from their broker in "street name" and in these cases, assuming that you mailed notice to the broker, the broker would have no way of determining from its current records who the actual owners of the stock were. Thus, your plan of sending notices to only those stockholders who had the shares registered in their names was not reasonably calculated to permit stockholders of Stirling Homex Corporation to receive notice. in fact, it seems likely that only a small portion of the current stockholders of Stirling Homex Corporation received notice, which would seem to provide a logical explanation for the fact that no answers no objections had been received in court at the time of Judge Burke's June 13, 1977 decision. For this reason, I believe it is incumbent upon you to permit this matter to be reopened in order that it may be fully litigated by the partiers in interest in accordance with the intent of Congress as expressed in the Bankruptcy Act.

Very truly yours,

s/Samuel H. Sloan

cc:
Honorable Harold P.Burke
Johnson, Reif & Mullan
Brown, Kelly, Turner, Hassett & Leach
Pomerantz, Levy, Haudek & Block

Milberg, Weiss, Bershad & Spechtrie
Bader & Bader
Nixon, Hargrave, Devans & Doyle
Zalkin, Rodin & Goodman
Phillips, Lytle, Hitchcock, Blaine & Huber
Securities & Exchange Commission
Brown, Wood, Ivey, Mitchell & Petty
Jaeckle, Fleischmann & Mugel

APPENDIX H

JOHNSON, REIF AND MULLAN, P.C.
Attorneys and Counselors at Law
47 South Fitzhugh Street
Rochester, N.Y. 14614
(716) 262-5700

September 13, 1977

Mr. Samuel H. Sloan
1761 Eastburn Avenue No. A5
Bronx, New York 10457

Re: *Stirling Homex Corporation*

Dear Mr. Sloan:

Your letter of September 2, 1977, to Frank G. Raichle, Trustee in the Reorganization of Stirling Homex Corporation, has been referred to me. I have reviewed the corporation and previous counsels' files for this matter and would bring the following to your attention.

This office does hold certificates for 46,300 shares of Stirling Homex Corporation preferred stock, and 1,250 shares of Stirling Homex Corporation common stock, which certificates were turned over to this office in January of 1975 by Jaeckle, Fleischmann and Mugel, former counsel to Frank G. Raichle as Trustee, and whihc we understood had been directed to them by your office. As you know, the Trustee terminated the services of Chemical Bank, as Transfer Agent for Stirling Homex Corporation, because of the cost of maintaining that service, when it became obvious that the debts of the corporation would exceed legitimate creditor claims, thus rendering the corporation insolvent, and therefore rendering the interest of the shareholders

worthless. Prudent administration of this estate necessitated eliminating all unnecessary expenses, and this was deemed by the Trustee to be one of those expenses.

The Trustee's evaluation as to the financial status of the corporation was confirmed by the Federal District Court, Western District of New York, by its order of June 13, 1977, wherein the Court found that "Stirling Homex Corporation, the Consolidated Debtor, is insolvent and the stockholders have no equity in said Consolidated Debtor and are not entitled to vote on a plan or share in the distribution of the proceeds of the liquidation of the assets."

A separate question had been presented to the Court, relative to the interest of those shareholders who claimed to have been defrauded in the purchase of their securities. By separate order dated July 27, 1977, the Federal District Court, Western District of New York found that "the claims of allegedly defrauded stockholders are classified as subordinate to the claims of conventional general creditors."

In understand that you have a copy of these Orders, and you and your counsel can interpret them as you wish. We shall continue to advise the Trustee, however, that absent reversal on appeal, these Orders effectively render the shareholders interest valueless, and therefore the Trustee should not incur the expense of transferring securities on behalf of any individual shareholder.

Your letter further states that you did not receive notice of the proceedings which resulted in the two Orders referred to above. For your information, the proper method of notification of shareholders in a Reorganization Proceeding is determined by the Court, itself. The Federal District Court, Western District of New York made the determination, by Order dated April 28, 1977, that notice was to be rendered to shareholders as follows:

1. To the shareholders of Stirling Homex Corporation as of December 31, 1973, at the addresses listed for those shareholders upon the records of the corporation as of the same date.

2. By publication on at least two occasions in the Wall Street Journal.

If the preferred and common stock was registered in your name as of December 31, 1973, notice of the proceedings was directed to your attention at the address listed on the records of the Chemical Bank as Transfer Agent on that date. If you moved, and did not properly notify the Transfer Agent, or the Trustee, it is possible that the notices were not forwarded to you by the United States Post Office. If the stock was registered in the name of an investment or security broker, notice would have been directed to that broker, and I presume he would notify those individuals for whom security was held. Such notification by the broker, however is a matter between the broker and his clients, and not of import to the Trustee.

The Court did, I am sure, consider the possibility that there would be instances when notification by mail would not accomplish actual notice, and thus required publication of the notice of the proceedings in the Wall Street Journal. This occurred on May 11, 1977, and May 18, 1977, and it is our opinion that given the number of shareholders involved that every reasonable effort has been made to notify you of the proceedings.

In light of all these circumstances, we have advised the Trustee that he should not consent to a reopening of the June 13, 1977, decision as you have requested.

If you would like us to return the stock certificates to you, we would be happy to do so.

Yours truly,

s/ Thomas W. Petrillo
Thomas W. Petrillo, Esq.

TWP/pjn

cc: Frank G. Raichle, Trustee
Security and Exchange Commission

EXHIBIT I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of
STIRLING HOMEX CORPORATION,
Consolidated Debtor.

In Proceedings for Reorganization Under
Chapter X of the Bankruptcy Act

BK-72-1399

ORDER FINDING DEBTOR INSOLVENT

At Rochester, in said district, on the 13th day of June, 1977.

This cause having come on to be heard before me on the 13th day of June, pursuant to the Order of this Court dated April 28, 1977, and notice of said hearing having been given as required by said Order to creditors and stockholders of said debtor, and other persons designated to receive such notice; and upon said hearing the following have appeared: Frank G. Raichle, Trustee in Reorganization of Stirling Homex Corporation, Con-

solidated Debtor; Johnson, Reif and Mullan, P.C., attorneys for Trustee, by Byron Johnson, Esq. and Thomas W. Petrillo, Esq.; Zalkin, Rodin & Goodman, attorneys for Chemical Bank, by Henry Lewis Goodman, Esq. and Richard Toder, Esq.; Pomerantz, Levy, Haudek & Block, attorneys for Gregory Jezarian, et al, by Robert B. Block, Esq.; Brown, Kelly, Turner, Hassett & Leach, attorneys for The Travelers Indemnity Company, by Frederick D. Turner, Esq.; Bader and Bader, attorneys for Mrs. D. Windsor Dixon, by I. Walton Bader, Esq.; Nixon, Hargrave, Devans & Doyle, attorneys for Lincoln First Bank of Rochester, by Edward J. Burns, Esq.; Brown, Wood, Ivey, Mitchell & Petty, attorneys for Merill, Lynch, Pierce, Fenner & Smith, Incorporated, by A. Robert Pietrzak, Esq.; and Phillips, Lytle, Hitchcock, Blaine & Huber, attorneys for Marine Midland Bank, by Alexander C. Cordes, Esq.

NOW, upon the application of Frank G. Raichle, Trustee, dated April 28, 1977, the Section 167 report of the Trustee dated April 18, 1977, and upon the testimony and evidence developed on the hearing before the Court, no answers having been filed and no objection having been urged by any party in interest, and due deliberation having been had thereon, it is

DETERMINED, FOUND, ORDERED, ADJUDGED AND DECREED, that

1. The fair value of the assets of Stirling Homex Corporation, as consolidated debtor, is $16,986,376.00.

2. The amount of debts of Stirling Homex Corporation, as consolidated debtor, is $45,961,000.00.

3. Stirling Homex Corporation, the consolidated debtor, is insolvent and the stockholders have no equity in said consolidated debtor and are not entitled to vote on a plan or share in the distribution of the proceeds of the liquidation of the assets.

4. Stirling Homex Corporation, the consolidated debtor, shall contine in reorganization under Chapter X to enable the Trustee to prepare and submit a plan in the nature of an orderly liquidation of the remaining assets of the consolidated debtor which plan shall be prepared and presented in accordance with orders of this Court.

5. All other portions of the Trustee's Application, dated April 28, 1977, are reserved for further Order of this Court.

s/ Harold P. Burke
District Court Judge

EXHIBIT J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of:

STIRLING HOMEX CORPORATION, Debtor
(Matter of Samuel H. Sloan, Appellant)

NOTICE OF MOTION
for dismissal of appeal

***

Honorable Harold P. Burke, USDJ

Brief statement of the relief requested:
Motion to dismiss appeal on merits as being frivolous.

Previous requests for similar relief and disposition:
1) Previous motion made to dismiss appeal for failure to perfect

appeal.
2) Appellant's counsel is moving concurrently for leave to withdraw as appellant's counsel on ground he believes appeal is without merit.

Statement of the issue(s) presented by this motion:
Whether this court should dismiss appeal as being frivolous and without merit.

Brief statement of the facts (*with page references to the moving papers*): Appeal sought to be dismissed is from an order of U.S. District Court refusing to reopen a prior order of the same court dated June 13, 1977 which held the debtor to be insolvent and that shareholders no longer had any interest in the estate of the debtor. Said order of June 13, 1977 followed service of notice etc., upon all creditors and shareholders including appellant and also followed a plenary hearing in which creditors and shareholders were represented. No party participating objected to the order. Appellant made no showing result would have been different if order had been reopened.

Summary of the argument (*with page references to the moving papers*):
Appellant was served with notice and failed to appear. His own attorney states in affidavit submitted on companion motion for leave to withdraw that he has made additional investigation and that in his opinion the appeal is without merit.

*Oral argument is requested only because it was requested in companion motion (mentioned above) brought by appellant's counsel for leave to withdraw. Oral argument of this motion would be waived if oral argument is not granted in companion motion.

October 23, 1978

s/ Byron Johnson
Byron Johnson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of:
STIRLING HOMEX CORPORATION,

Debtor.

(Matter of Samuel H. Sloan, Appellant)

Docket No. 78-5016

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

Byron Johnson, Esq., being duly sworn deposes and says that:

1. He is a principal of JOHNSON, REIF AND MULLAN, P.C., attorneys for Frank G. Raichle, duly appointed and acting trustee of the debtor.

2. Following service of notice as directed by the United States District Court for the Western District of New York, together with a complete Section 167 Report of the trustee which service was duly made on the Securities and Exchange Commission, all creditors and shareholders of the debtor, including the appellant Sloan, and following also a plenary hearing on the subject of insolvency of the debtor and the trustee's efforts to revive the debtor as a viable corporate entity, an order dated June 13, 1977 was made which held the debtor to be insolvent, the shareholders to have no further interest in the debtor's estate and which directed the trustee to file a Plan of Reorganization which was to be in the nature of an orderly liquidation.

3. Creditors and shareholders were represented on such hearing, and no objections to the courts findings with respect to insolvency were raised by any party.

4. The appellant did not appear or participate. Several months later he moved to reopen on the ground that the debtor may not have been insolvent and that the trustee had not made sufficient effort to revive the debtor as a viable and going entity. However, he made no showing that the result would have been different if the court had reopened the matter and conducted a furtehr hearing. In the order appealed from Judge Burke found that notice had been properly served on appellant and that appellant's failure to file an affidavit of merit was fatal. See Judge Burke's opinion, Exhibit "A" annexed.

5. This matter is not new to this court; see Judge Meskell's opinion in Matter of Sterling Homex Corporation, (1978) 579F2nd 206,208.

6. The trustee has now liquidated substantially all of the debtor's assets and is about to file a Plan of Reorganization. It is important that this matter be disposed of so that the creditors who have been waiting for over six (6) years may receive the funds which they are titled to.

s/Byron Johnson

Sworn to October, 23, 1978.

[Order of Harold P. Burke, U.S.D.J. dated Februaryh 16, 1978, attached to foregoing, printed herein as Exhibit E.]

APPENDIX K—Order of United States Court of Appeals, denying motion by appellant to file brief and appendix.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fifteenth day of December, one thousand nine hundred and seventy-eight.

In the Matter of:
STIRLING HOMEX CORPORATION,

Debtor

(Matter of Samuel H. Sloan)

Appellant

v.

CHEMICAL BANK

Appellee

It is hereby ordered that the motion made herein by the appellant pro se dated December 8, 1978 for leave to file a brief and appendix be and it hereby is denied.

s/Thomas J. Meskill, U.S.C.J.

FILED DEC. 15, 1978

EXHIBIT L — Order granting appellant's motion for a transcript of oral argument

UNITED STATES COURT OF APPEALS

Second Circuit

At a * * * on the 16th day of May, one thousand nine hundred and seventy-nine.

In the Matter of:

STIRLING HOMEX CORPORATION,

Debtor.

(Matter of Samuel H. Sloan)

Appellant

v.

CHEMICAL BANK,

Appellee

It is hereby ordered that the motion made herein by the appellant by notice of motion dated May 1, 1979 for leave to file a motion for a transcript of oral argument be and it hereby is GRANTED to the extent that, for whatever it may be worth, the transcript shall be furnished to appellant pursuant to the usual practice of this Court, *provided* that appellant understands that, due to technical difficulties, the tape is inaudible.

William H. Timbers,
Circuit Judge